

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

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TCEQ DOCKET NO. 2007-1259-PST-E
CHIEF CLERKS OFFICE

IN THE MATTER OF	§	BEFORE THE STATE OFFICE
TEXAS COMMISSION ON	§	
ENVIRONMENTAL QUALITY	§	
ENFORCEMENT ACTION AGAINST	§	OF
4200 ROSEDALE LLC AND	§	
GOODYEAR TIRE AND RUBBER CO.	§	
RN 104917885	§	ADMINISTRATIVE HEARINGS

**4200 ROSEDALE, LLC'S
EXCEPTIONS TO THE ALJ'S PROPOSAL FOR DECISION**

Respondent 4200 Rosedale, LLC ("Rosedale"), submits this its "Exceptions to the ALJ's Proposal for Decision" ("Exceptions"), and would respectfully show the Commission the following:

**I.
Procedural History**

1. On April 8th, 2010, Ami L. Larson, Administrative Law Judge for the State Office of Administrative Hearings ("ALJ"), conducted a hearing in the above-referenced matter ("The Hearing").

2. Before the hearing, counsel for Rosedale, the Goodyear Tire & Rubber Company ("Goodyear"), and the Texas Commission on Environmental Quality ("TCEQ"), worked together to provide the ALJ with a substantial set of stipulations to whose admission into evidence the parties had agreed ("The Stipulations"), as well as a number of exhibits which were entered during the hearing.

3. In addition to the Stipulations, the evidence including the testimony of three witnesses: 1.) Mr. Robert Lonnie Gilley¹, called by the TCEQ; 2.) Ray Hashemian, called by Rosedale and 3.) Mr. Donald Dixon, called by Goodyear.

4. At the conclusion of the Hearing, the ALJ requested post-hearing briefs from the parties. Rosedale timely submitted its "Post-Hearing Brief" and, by this reference, fully incorporates the contents of said brief and any and all exhibits attached thereto and/or referenced in The Hearing, as well as any testimony referenced therein into this Response, as if recopied in their entirety and set forth herein.

II.

Proposal for Decision

5. On June 22nd, 2010, the ALJ issued a Proposal for Decision ("The Proposal"). In The Proposal the ALJ stated:

Based upon the UST Notification and Registration forms filed by Goodyear in 1987 [*sic*] and 1992, respectively, Rosedale asserted that Goodyear is the owner of the [underground storage tank – ("UST")] and should be held responsible for any related violations. Goodyear denied ever having owned or registered as the owner of the UST, but *claimed that it was merely an operator and lessee of the UST during the term of its lease of the Property* from January 1971 through January 1986.

The ALJ finds that the ownership of the UST at issue is 'uncertain, unknown, or in dispute' pursuant to TCEQ rules. Accordingly, Rosedale, as the fee simple owner of the Property where the UST is located, is considered to be the owner of the UST absent any legally sufficient demonstration that Goodyear, or another person, is the owner.

Please see The Proposal; p. 4, ¶¶ 2-3 (emphasis added).

¹. Mr. Gilley was the TCEQ field inspector who investigated and oversaw this matter for TCEQ.

6. Using this reasoning, The ALJ concluded that Rosedale was the owner of the underground storage tank in question (the "UST") and that Rosedale therefore had violated 30 TAC § 334.47(a)(2) by failing to timely remove the UST from service and 30 TAC § 334.7(d)(3) "by failing to provide an amended UST registration to the Commission for any change or additional information regarding the UST." (Please see The Proposal; pp. 6 - 7 ¶ 4).

7. This reasoning, however, demonstrates a flawed understanding of both the facts in this case and the controlling law. The ALJ's decision relies heavily on her understanding that "Goodyear denied ever having owned or registered as the owner of the UST, but *claimed that it was merely an operator and lessee of the UST during the term of its lease of the Property* from January 1971 through January 1986." Proposal at 4. (Emphasis added.) This is wrong. Goodyear did not claim that it never owned the UST; instead, Goodyear admitted that it owned the UST for 15 years from January 1971 to January 1986. Goodyear admitted that it was the lessee of the UST under a lease with the then owners of the real property at 4200 Rosedale in Tarrant County Fort Worth Texas ("The Property"). Under applicable law, that is an admission of ownership. See Rule 334.2(73) (defining an owner as "[a]ny person who holds legal possession or ownership of an interest in an underground storage tank...."); see also Gilley cross-examination at 2:00:58 – 2:01:08 and 2:01:09 – 2:01:22 of the audio recording of The Hearing). The question before the ALJ was whether Goodyear's ownership of the UST continued after January 1986, and the UST Notification filed by Goodyear in 1986, the UST Registration filed by Goodyear in 1992, and Goodyear's other acts and omissions establish that it should be considered the continuing owner under applicable law, specifically 30 TAC § 334.2(73),

III. **Facts**

8. Rosedale has been found liable for the actions and inactions of the party the ALJ exonerated: Goodyear. The fundamental unfairness of this result strongly suggests that the ALJ has misinterpreted the applicable law and evidence.

9. The central facts are these: In 1971, Doug Corder and Glenn Walls ("Corder/Walls"), owned the Property and leased it to Goodyear under a lease that, by its terms, ran from January 31, 1971 to January 31, 1986 ("The Lease"). Although there was no direct evidence to this effect, Goodyear asserts that Corder and Walls installed the UST at Goodyear's request before the term of The Lease began on January 31, 1971. As the ALJ acknowledged, there is no direct evidence regarding the construction of the UST, and the lease is silent as to which party would own the UST when the lease expired. Proposal at 3. Thus, as lessee under The Lease, Goodyear admits to having owned, maintained possession of, and operated the UST for at least 15 years. *See* Rule 334.2(73) (defining an owner as "[a]ny person who holds legal possession or ownership of an interest in an underground storage tank...."). According to Goodyear, its ownership of the UST terminated when The Lease expired on January 31st, 1986.

10. And, according to Goodyear, that was the end of its ownership interest in the UST. Goodyear's sole witness, Mr. Dixon, attempted to provide testimony to support Goodyear's claim that The Lease provided that ownership of the UST would revert to the owner of the Property upon its expiration. The ALJ in The Proposal gave substantial credence to Mr. Dixon's testimony (Please see The Proposal; p. 3 ¶ 1). Mr. Dixon's testimony, however, bordered on worthless: 1.) The language used in The Lease was different from the language used in present Goodyear leases [audio recording of The Hearing at 3:11:06 – 3:11:28 (Dixon cross-examination)]; 2.) Dixon had no personal knowledge of the definitions contemplated or used in

The Lease [audio recording of The Hearing at 3:11:28 – 3:11:41 (Dixon cross-examination)]; 3.) Dixon testified that he was not aware of and had not viewed any plans, drawings, specifications, or correspondence regarding The Lease, despite the fact The Lease referred to extraneous documents. Please refer to the audio recording of The Hearing at 3:10:30 – 3:11:05, 3:09:15 – 3:09:35, and 3:09:35 – 3:09:45 (Dixon cross-examination). Dixon's testimony provided no credible evidence as to which party owned the UST upon expiration of The Lease. Instead, this question is answered by Goodyear's subsequent actions.

11. Three months after expiration of The Lease, in an act wholly inconsistent with Goodyear's contention regarding ownership, Goodyear filed a Notification for Underground Storage Tanks ("UST Notification"), dated April 29th, 1986, in which it identified itself as the owner in "Section I Ownership of Tank(s)" and signed the owner's certification (Please See Stipulation No. 8).² Although Goodyear referred to a lease, and the ALJ relied upon Goodyear's status as a lessee in The Proposal (Please see The Proposal; p. 4 ¶¶ 2-3), the law is clear that a lessee is an "owner" within the statutory scheme. See Rule 334.2(73). Further, on cross-exam Mr. Gilley testified that he had never seen a lessee file either of the documents filed by Goodyear -- the UST Notification and the Underground Storage Tank Registration ("UST Registration") (Please see audio recording of The Hearing at 1:04:28 – 1:05:05 (Gilley cross-exam)).

12. Thus, Goodyear's actions shortly after the expiration of The Lease contradict its present argument in this litigation. Although Goodyear claims that its ownership of the UST expired upon the termination of The Lease, Goodyear did not have the putative new owner of the

². The "Ownership of Tank(s)" section states, "Lease Controlled by Goodyear Tire & Rubber". Under Rule 334.2(73), a lessee -- as someone with legal possession -- is an owner of a UST. See also audio recording of The Hearing (Gilley cross-exam) at 2:00:58 – 2:01:08 and 2:01:09 – 2:01:22.

UST make a filing, nor did Goodyear file a form disclaiming ownership and identifying any putative new owner (whether or not such a filing would have been effective to transfer ownership is another question³). Instead, Goodyear filed the UST Notification in April 1986 in which it *affirmed* its ownership of the UST.

13. Having gone on record as the owner of the UST in 1986, Goodyear contends that it attempted to disclaim ownership of the UST in a subsequent filing made in 1992.⁴ Goodyear filed the UST Registration dated July 29, 1992, with the Texas Water Commission ("TWC")⁵, and checked the box indicating that it was an "amended form". Despite Goodyear's claim that the filing was intended to transfer ownership, as a matter of law these filings cannot do so.

14. First, the UST Registration says nothing about the UST or any alleged transferee. Instead, the UST Registration says only that "Goodyear is no longer owner or operator of this facility as the lease controlling the property ~~**release detection upgrade**~~ was canceled or is expired." Mr. Gilley testified at length regarding the distinction between a "facility" -- a site, tract, or other defined area where a UST is located -- and a "UST" -- a system that contains petroleum substance [...] (30 TAC § 334.47(a)(2)(36)(82) (Please see audio recording of The Hearing at 1:16:34 – 1:17:31 (Gilley cross-exam))).

15. Further, Goodyear signed the "Owner Certification" of the UST Registration form filed in 1992. At trial, TCEQ's own witness could not square this fact with Goodyear's argument

³. Under current law, such a filing would not be effective as 30 TAC § 334.7(d)(1)(A)(ii) provides that "amended registrations reflecting UST ownership transfers must be provided by the new UST owner or a legally-authorized representative of the new UST owner". That section, however, was not in effect in 1986-87, and it is not clear what the applicable law was then.

⁴. The Stipulations established that Goodyear is the only person, party or entity to have filed any UST documents with the state regarding The Property. Mr. Gilley testified that he had never seen any party file such documents who wasn't the owner of the UST.

⁵. The TWC was the forerunner of the TCEQ.

that the filing of this document did not establish Goodyear as the undisputed owner of the UST. When asked on cross-examination "How does [the filing of the UST Registration form in 1992] not make Goodyear the owner?", Gilley responded, "I don't know".

16. Gilley's response is understandable, both as a matter of common sense and as a matter of law. Indeed, under 30 TAC § 334.7(d)(1)(A)(ii), "amended registrations reflecting UST ownership transfers must be provided by the new UST owner or a legally-authorized representative of the new UST owner (i.e., registrations of ownership transfers submitted by others will be returned and will not be recorded)". A former owner cannot legally file a registration form for a new owner. And this makes perfect sense, as the transfer of ownership of a UST is accompanied by the risk of considerable liability. The fact the UST Registration was accepted and recorded indicates that the TCEQ quite sensibly accepted that Goodyear, which signed as the owner, was in fact the owner.

17. In fact, the evidence shows that the TCEQ considered Goodyear to be the owner after the filing of the UST Notification in 1986 and continued to view Goodyear as the owner after the filing of the UST Registration in 1992, as is reflected by TCEQ's billing Goodyear for fees for the UST for each year from 1988 through 1993 (Please See Stipulation No. 10). Though this document (dated November 21, 1992) reflects a decision by the TCEQ to delete the fees assessed to Goodyear, this decision was contrary to law, as no other party had filed as the owner under 30 TAC § 334.7(d)(1)(A)(ii), and the TCEQ accordingly had no legal basis for ignoring the two forms that it had already interpreted as indicating Goodyear's ownership.

18. Goodyear argues that the fact that the "Owner Information" section is left blank on the UST Registration means Goodyear did not submit the UST Registration as the owner.

The fact that the information is omitted, however, cuts against Goodyear's argument. According to Goodyear's argument at trial, when The Lease expired, Goodyear ceased to be an owner of the UST, and ownership vested in Corder/Walls as the fee simple owners of the Property. Thereafter, Goodyear argues, ownership of the UST ran with the Property as it changed hands from Corder/Walls to the Rosenaus and then to Youssef Esmailzadeh and Nahid Youssefzadeh ("The Esmailzadehs"), and finally to Rosedale. This is Goodyear's contention now in litigation, but if Goodyear had believed it to be true in 1992, it would have listed Corder/Walls in the "Owner Information". If Goodyear was aware in July 1992 that Corder/Walls had transferred the Property to the Rosenaus (and The Stipulations Nos. 10 and 11 establish that Goodyear was aware of this by November 1992), Goodyear would have listed the Rosenaus in the "Owner Information" box. Instead, Goodyear listed neither. On each occasion in filing the UST Notification and the UST Registration in 1986 and 1992, *Goodyear failed to provide any new owner information it should have provided* if it was indeed acting consistently with its current legal theory; that it ceased to be the owner of the UST on January 31st, 1986 (the end of The Lease).

18. As it happens, the Property had already changed hands *twice* by the date of the filing of the UST Registration and was then owned by The Esmailzadehs. Only after Goodyear (apparently) contacted the TCEQ by telephone in November 1992 purporting to disclaim ownership of the UST, did the TCEQ send a letter to the Rosenaus on December 9th, 1992, stating that "[w]e have been notified by the Goodyear Tire and Rubber Company in Akron, Ohio that you are the current owner of the above-referenced underground storage tank." (Please See

Stipulation No. 11).⁶ The letter stated further that the UST's "release detection system is unknown", suggesting that already 18 years ago there was a liability issue from which Goodyear was trying to extricate itself at the expense of a comparatively innocent party.

20. As a result of this failure to apprise the TCEQ of the alleged transfer of ownership, the TCEQ ignored the entire prior chain of fee simple ownership and came after only the present fee simple owners, Rosedale instead of 1.) The Esmailzadehs, 2.) The Rosenaus, or 3.) Corder/Walls, each of whom is successively a more appropriate party for the TCEQ to target. Rosedale's relationship to the UST (built 40 years ago) is more attenuated than that of any of the intervening owners of the Property, but, thanks to Goodyear's silence, Rosedale -- which was unaware of the existence of the UST when it purchased the Property -- (Please see audio recording of The Hearing 2:20:16 - 2:22:53 (Ray Hashemian direct exam), is now asked to foot the bill for the acts and omissions of the only established party that can be shown by The Stipulations to have *known of and used* the UST, filled it with contaminants, and then left it to rust away.

IV.

Law & Argument

21. Under 30 TAC § 334.2(73),

... a person who has registered as an owner of a UST system or AST with the commission under §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems) (or a preceding rule section concerning tank registration) after September 1, 1987, shall be considered the UST system owner and/or AST owner until such time as documentation demonstrates to the executive director's satisfaction that the legal interest in the UST system or AST

⁶. There is no record of any written notification by Goodyear; presumably this notification was made by telephone, by an unidentified Goodyear representative to an unidentified TWC employee, resulting in the deletion of fees previously assessed to Goodyear as the owner of the UST.

was transferred to a different person subsequent to the date of the tank registration. . . .

Presumably the "documentation" referred to in this passage is a superseding registration form filed by a new owner. *See* 30 TAC § 334.7(d)(1)(A)(ii). No such registration form was ever filed, nor does the record reflect that Goodyear itself submitted any other documentation to the TCEQ in November 1992 when Goodyear somehow convinced the TCEQ that the Rosenaus (who had already sold the Property more than five-and-a-half years earlier!) were the actual owners of the UST.⁷

22. The reference to July 1, 1987, is explained by the language of 30 TAC § 334.7(a)(1), which requires that "[a]ll underground storage tanks (USTs) in existence on or after September 1, 1987, must be registered with the agency...." *See also* 30 TAC § 334.7(b). And Rule 334.7 further explains that this registration requirement may be satisfied by a prior filing; *i.e.*, if the tank is

properly registered with the agency prior to the effective date of this subchapter under the provisions of the federal Solid Waste Disposal Act, §9002 (42 United States Code, § 6921, *et seq.*), provided that the owner or operator must submit notice of all changes and additional information in accordance with the provisions of subsection (d) of this section[.]

⁷. Mr. Gilley testified to this case being "an unusual scenario" due to the fact that the Rosenaus' were listed on the PST Registration data-base as the owners of the UST (Please See Exh. No. 29 from The Hearing), despite the fact that the Rosenaus' had sold The Property years ago to The Esmailzadehs, who then subsequently sold The Property to Rosedale, still years before Mr. Gilley began his investigation in 2007 (Please see audio transcript of Gilley cross-exam [2:08:43 – 2:09:10]). Mr. Gilley continued to testify in cross-examination that based upon the PST registration data-base, he initially believed the Rosenaus to be the owner of the UST, and although the PST Registration listed the Rosenaus' physical address, Gilley testified that he never attempted to contact the Rosenaus, but rather, revised his belief as to ownership of the UST based solely upon his subsequent review of the Tarrant County Appraisal District documents which listed Rosedale as the fee current simple owner to The Property (Please see audio transcript of Gilley cross-exam [2:00:00 – 2:00:41]/[2:06:56 – 2:07:55]/[1:05:30 – 1:06:50]/[1:06:51 – 1:07:12]).

30 TAC § 334.7(a)(1)(C). Thus, by virtue of the UST Notification filed before July 1, 1987, Goodyear was -- after July 1, 1987 -- “a person who has registered as an owner of a UST system or AST with the commission under §334.7 of this title”. See 30 TAC § 334.2(73). Moreover, Goodyear in 1992 reaffirmed its ownership of the UST by filing the UST Registration, and the TCEQ's actions in assessing fees to Goodyear acknowledged its understanding that Goodyear was the owner. As the TCEQ's own witness conceded, the owner of the UST is responsible for payment of applicable fees (Please see audio recording of The Hearing (Gilley cross-exam) at 2:00:52 – 2:00:58), and the fee-simple owner is the owner of the UST only if the UST is not registered. (Please see audio recording of The Hearing (Gilley cross-exam) at 2:00:42 – 2:00:50). Goodyear registered as the owner of the UST within the meaning of this language first in 1986 and again in 1992, and there was no subsequent registration by any other party. Quite simply, Goodyear has been the registered owner of the UST at all times since April 29, 1986, and that fact should suffice to settle the question.

23. Moreover, Goodyear's only argument to the contrary relies on a contention that it transferred ownership as of the expiration of the Corder/Walls lease on January 31, 1986. The statute is quite clear in stating that

a person who has registered as an owner . . . shall be considered the UST system owner and/or AST owner until such time as documentation demonstrates to the executive director's satisfaction that the legal interest in the UST system or AST was transferred to a different person *subsequent to the date of the tank registration*. . .

30 TAC § 334.2(73) (emphasis added).

Goodyear first registered the tank as an owner on April 29th, 1986, and then did so again on July 29th, 1992. The termination of a lease on January 31st, 1986, cannot form the basis for a finding

that Goodyear was not the owner. As Goodyear has made no allegations of a transfer of its ownership interest after July 29th, 1992 (or after April 29th, 1986, for that matter), this language forecloses any argument that Goodyear should not be considered the UST's owner.

24. Instead of focusing on this language, the ALJ focused on another portion of Rule 334.2(73):

if the actual ownership of a UST system or an AST is uncertain, unknown, or in dispute, the fee simple owner of the surface estate of the tract on which the UST system or the AST is located is considered the UST system or AST owner unless that person can demonstrate by appropriate documentation, including a deed reservation, invoice, bill of sale, or by other legally acceptable means that the UST system or AST is owned by another person.

This language, however, would not seem to apply *where there is a registered owner of the UST* because the registration itself would preclude any uncertainty. The language quoted in paragraph 23 above seems to be conceptually prior to this language; *i.e.*, this language should be interpreted as applying only where no party has registered as an owner. And that is not the case here. However, even if this language is applied before the other clause is considered, it makes no difference to the outcome. The UST Notification and the UST Registration constitute the requisite "appropriate documentation" demonstrating Goodyear's ownership under Rule 334.2(73).

25. It should also be pointed out that, to the extent any uncertainty can legitimately be said to exist, it exists because of Goodyear's failure to make its current argument back in 1986, when it now claims its ownership interest terminated. Three intervening fee simple owners were thus ignored, because Goodyear's filings had -- in the mean time -- convinced the TCEQ that

Goodyear was in fact the UST's owner. Now, the wholly innocent Rosedale is expected to pay the price.

26. Finally, regarding Rosedale's alleged violation of 30 TAC § 334.7(d)(3) "by failing to provide an amended UST registration to the Commission for any change or additional information regarding the UST", Rosedale contends it is unjust for this provision to be applied against it in the absence of a finding that Rosedale knew of the UST before the violation was alleged. Rosedale was unaware of the presence of the UST when it purchased The Property, which is more than can be said of Goodyear, which has caused any uncertainty that can be said to exist. Moreover, Rosedale notes the injustice of its being singled out for prosecution while previous owners of The Property were not charged for the same offense.

V.

Conclusion

27. It is undisputed that Goodyear was owner and operator of the UST for at least 15 years from January 1971 to January 1986. The only issue is whether that ownership as determined by applicable law (30 TAC § 334.2(73)) continued after Goodyear's lease of The Property expired. In fact, on two separate occasions after the lease had expired, Goodyear made affirmative filings with the state acknowledging its ownership of the UST. In April 1986, Goodyear both signed as the owner and provided further information (its control of a lease of the UST) that established Goodyear as the owner of the UST under applicable law. In July 1992, Goodyear filed the UST Notification and again signed as owner of the UST by signing the "Owner Certification". Both legally and equitably, Goodyear has established itself under Texas law as the registered owner of the UST and, as such, the financially responsible party. And the TCEQ's own actions in assessing fees against Goodyear show Rosedale's argument to be correct.

28. In contrast, the stipulated documents, record and testimony, establish Rosedale had no knowledge of the existence of the UST on The Property, never filed any documents affirming ownership of the UST, and never received any documents from Goodyear or TCEQ in which it was informed of any putative status of ownership of the UST. A finding of legal ownership of the UST by Rosedale based upon the stipulated documents, record, and testimony would result in a misapplication of the law and a gross injustice and inequitable outcome to this matter.

29. The provision that would allow TCEQ to hold the fee simple owner of the surface estate accountable for violations when the "actual ownership of a UST system is uncertain, unknown, or in dispute" is intended to apply in situations where the culpable parties are unknown or unavailable – i.e., situations where the taxpayers would have to pick up the tab for damage caused by private parties.

30. The stipulated documents, record and testimony have failed to establish that Rosedale was at any time the registered owner of the UST. Further, the stipulated documents, record and testimony have established that Goodyear is the sole entity or person to have affirmed (twice) its ownership through registration and operating. The record further establishes that there is no documentation demonstrating "that the legal interest in the UST system or AST was transferred to a different person subsequent to the date of the tank registration" by Goodyear. Rosedale is not the owner of the UST under the applicable provision of the Texas Administrative Code. Moreover, the purpose of the relevant environmental protection provisions will be better served by assessing violations and cleanup costs against a party that actually owned and/or

operated the UST than by assessing such penalties against an innocent landowner without notice or knowledge of the UST.

31. Rosedale reasserts its relief sought and respectfully requests that this Court grant judgment in favor of Rosedale and find Goodyear to be the lawfully registered owner of the UST made the basis of this litigation.

Respectfully submitted,

By: /S/ S. George Alfonso

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing "Exceptions to the ALJ's Proposal for Decision", has been duly served in accordance with all required rules on this the 12th day of July, 2010, on:

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